

“Court-Performed” Mediation in the People’s Republic of China: A Proposed Model to Improve the United States Federal District Courts’ Mediation Programs

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I. INTRODUCTION

As a result of his celebrated visit to the United States in the early nineteenth century, Alexis de Tocqueville remarked on the tendency of the Americans to resort to legal action to resolve most of their social problems.¹ What was a sophisticated and subtle observation nearly two centuries ago remains an astute commentary on our culture, describing one of the most controversial aspects of our society. Although Americans’ “tendency” to rely on the legal system to resolve many of their disputes is troubling to some,² it certainly can be perceived as evidence that the United States has been successful, to some degree, in establishing “a government of laws and not of men.”³ In recent years, however, our legal system has begun to show the strain of being an “all-purpose remedy that American society provides to its aggrieved members.”⁴

Although the population of the United States has increased slightly over 200% from 1904 to 1995, civil case filings in the federal district courts for the same period have increased 1,424%.⁵ Despite this astounding increase in

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¹ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 357 (Francis Bowen ed. & Henry Reeve trans., 2d ed. 1863) (1835).

² Chief Justice of the United States Supreme Court William H. Rehnquist stated in the 1998 Year-End Report of the Federal Judiciary that the increase in federal litigation is “one of the most serious problems” confronting the federal courts. William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*, THIRD BRANCH, Jan. 1999, at 1, 2.

³ JOHN ADAMS, *NOVANGLUS: OR, A HISTORY OF THE DISPUTE WITH AMERICA, FROM ITS ORIGIN, IN 1754, TO THE PRESENT TIME*, NOVANGLUS PAPER NO. 7 (1774), reprinted in 4 *THE WORKS OF JOHN ADAMS*, at 106, 106 (Charles Francis Adams ed., 1851).

⁴ JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 10 (1983).

⁵ See JUDICIAL CONFERENCE OF THE U.S., *LONG RANGE PLAN FOR THE FEDERAL COURTS* 10 (1995).

litigation, the number of district judges has not increased proportionally, and both the number of cases each judge must adjudicate and the complexity of those cases continue to increase.⁶ As a result of this mounting burden on the court, the federal judiciary itself has concluded that the "increasing atomization of society, its stubborn litigiousness, . . . and, paradoxically, the very popularity and success of the federal courts, have combined to strain the courts' ability to perform their mission."⁷

One way the federal courts have attempted to respond to the threat of an increasingly voluminous and diverse caseload has been to develop "court-annexed" alternative dispute resolution (ADR) programs that provide litigants with an opportunity to resolve their disputes through nontraditional means such as mediation, arbitration, and early neutral evaluation.⁸ Mediation, by far, has been the most widely adopted of these programs.⁹ The hope and promise of court-annexed mediation programs are twofold: First, and to some foremost, it is intended to provide litigants with a means of resolving their dispute so as to avoid the delays and high cost often associated with traditional litigation.¹⁰ Second, it is a flexible process that is

⁶ See *id.* (stating that "[b]etween 1970 and 1995, district court filings per judgeship increased from 317 to 436" and that "although complexity is difficult to quantify, most commentators would agree that the average case has increased in complexity"); see also *id.* at 15-16 (setting forth projections of future litigation growth and potential judicial resources). Chief Justice William H. Rehnquist warned:

Unless actions are taken to reverse current trends, or slow them considerably, the federal courts of the future will be dramatically changed. Few will welcome those changes. Some will say that we merely need to create more federal judgeships, which in turn would require more courthouses and supporting staff. The long term implications of expanding the federal judiciary should give everyone pause.

William H. Rehnquist, Remarks Before the House of Delegates at the American Bar Association's Mid-year Meeting (Feb. 4, 1992).

⁷ JUDICIAL CONFERENCE OF THE U.S., *supra* note 5, at 9.

⁸ For example, see the Civil Justice Reform Act of 1990 § 112, 28 U.S.C. § 471 note (1994) (Congressional Statement of Findings), which states that the CJRA was passed to address the "problems of cost and delay in civil litigation" within the federal courts and which specifically encouraged the use of ADR programs to accomplish that goal, *id.* "Evidence suggests that an effective litigation management and cost delay reduction program should incorporate several interrelated principles, including . . . utilization of alternative dispute resolution programs in appropriate cases." *Id.* For further discussion, see generally ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS (1996), which details the ADR programs and procedures in each of the U.S. federal district courts.

⁹ See PLAPINGER & STIENSTRA, *supra* note 8, at 4.

¹⁰ See Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, § 2, 112 Stat. 2993, 2993 (1998).

tailorable to a variety of disputes.¹¹ It permits parties to emphasize interests that traditional litigation is typically ill-suited to promote, such as relationship building and honest constructive communication that might permit the parties to resolve their dispute in a manner so that both are able to achieve their important objectives.¹²

While mediation's ability to offer a flexible and satisfying dispute resolution process that is typically not possible in litigation has gained wide acceptance,¹³ there is ongoing debate as to whether ADR programs successfully accomplish their goal of reducing court congestion and saving time and money.¹⁴ The Rand Institute for Civil Justice studied several federal district courts' mediation and early neutral evaluation programs over a four year period and found "no strong statistical evidence that the mediation or neutral evaluation programs, as implemented, . . . significantly affected time to disposition, litigation costs, or attorney views of fairness or satisfaction with case management."¹⁵ A different study of three districts, however, conducted by the Federal Judicial Center found the use of ADR more promising.¹⁶ It found that approximately fifty percent of the attorneys questioned believed that ADR reduced costs and approximately forty percent believed it saved time.¹⁷ However, only one district's data supported a finding that time actually was saved.¹⁸

¹¹ See Wayne D. Brazil, *Why Should Courts Offer Nonbinding ADR Services?*, 16 ALTERNATIVES TO HIGH COSTS LITIG. 65, 74 (1998). Another potential benefit of mediation is the "increased level of party participation in and control over decisions." Robert A. Baruch Bush, *What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 27 (1996).

¹² See Bush, *supra* note 11, at 27; see also ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 4 (Bruce Patton ed., 2d ed. 1991).

¹³ See STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 92 (1985).

¹⁴ See Alternative Dispute Resolution Act of 1990 § 2, 112 Stat. at 2993. Obviously the actual benefits of ADR are the subject of intense debate and study but are generally beyond the scope of this Article.

¹⁵ See JAMES S. KAKILAK ET AL., RAND INST. FOR CIVIL JUSTICE, AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT at xxxiv (1996).

¹⁶ See FEDERAL JUDICIAL CTR., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE IN COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, at 7-10 (1997).

¹⁷ See *id.*

¹⁸ See *id.*

Compounding the above concerns is that only a small percentage of federal litigants voluntarily avail themselves of ADR programs.¹⁹ Given the federal government's stated commitment to these programs and its apparent desire to integrate ADR methods firmly into the federal court landscape, interest may arise naturally regarding the cause of such a low rate of voluntary participation in federal mediation and how to improve these numbers. For example, are the programs not being implemented as effectively as they might be? If this is so, it is appropriate to evaluate what changes can be made to increase effectiveness and enhance litigants' confidence in these programs.

It is also possible, however, that litigants are hesitant to entrust their rights to such programs because of our cultural history regarding the nature of dispute resolution in the United States. A country's procedures for resolving disputes are interconnected with its culture.²⁰ Therefore, before implementing new procedural methods in a society, it is important to consider whether the procedure is consistent with the values of the culture and, hence, capable of garnering the public confidence necessary to achieve substantial acceptance of the new procedure. Historically, Americans have been accustomed to achieving justice through enforcement of the "rule of law" in an adversarial litigation context.²¹ Therefore, in crafting and implementing mediation programs in the federal courts, sensitivity should be given when addressing whether American society, which traditionally has sought unyielding protection of individual rights, can accept dispute resolution in a setting that could be perceived as encouraging the compromise and forfeiture of rights.

In making this evaluation, it may be useful to examine and compare the culture of the People's Republic of China, where voluntary mediation has long been a fully accepted and integrated part of its legal system. Voluntary mediation is regarded as the favored method of dispute resolution in China and accounts for the resolution of more than sixty percent of all cases filed in China's courts.²² Closer study of China's legal system reveals that the status

¹⁹ See ELIZABETH PLAPINGER & MARGARET SHAW, CENTER FOR PUB. RESOURCES, COURT ADR: ELEMENTS OF PROGRAM DESIGN 15 (1992) (quoting Wayne D. Brazil, *Institutionalizing ADR Programs in Courts*, in EMERGING ADR ISSUES IN STATE AND FEDERAL COURTS 52 app. C at 122 (Frank E. A. Sander ed., 1991)). U.S. Magistrate Judge Wayne D. Brazil states that because few litigants voluntarily use ADR programs, "volunteer programs are not likely to contribute significantly to cost and delay reduction." Brazil, *supra*, at app. C at 122.

²⁰ See Oscar G. Chase, *Legal Process and National Culture*, 5 CARDOZO J. INT'L & COMP. L. 1, 9 (1997).

²¹ See AUERBACH, *supra* note 4, at 3.

²² See Jun Ge, *Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China*, 15 UCLA PAC. BASIN L.J. 122, 128 (1996). In 1986,

of mediation in China is largely a product of a combination of Chinese cultural values and the historical evolution of China, which naturally differs vastly from that of the United States. Nonetheless, the Chinese legal system has been one of the world's most committed institutions in the use of mediation to resolve disputes and a leader in developing ways to maximize its benefits and effectiveness.²³ Consideration of the methods employed there may be warranted to determine whether there are any aspects of that system which can be borrowed successfully by the federal courts.

Part of the process of borrowing any aspect of China's mediation approach, however, first requires that the federal courts consider whether the values embodied in China's mediation program are compatible with American values with regard to dispute resolution, such that public confidence in the system will not be undermined. This Article demonstrates that China's "court-performed" mediation model is consistent with American dispute resolution practices and is both a culturally acceptable and a valuable means of reaching settlement in the federal courts. Although United States federal courts and litigants have not yet fully embraced mediation, they have embraced the practice of resolving disputes through judicially assisted settlement conferences, which are an integral part of our civil justice system and functionally similar to mediation in China. Unlike China, however, mediation in the United States district courts is not "court-performed," but rather "court-annexed." While federal district courts participate in the settlement conference through the presence of federal judges, the federal courts' participation in the mediation process is far more limited. By adopting a more court-performed mediation model like that of China's, the federal courts will enhance the credibility of mediation, thus inspiring greater use and participation in it and thereby help to transform the way our society resolves disputes.

II. MEDIATION IN CHINA

*"It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit."*²⁴

A. Cultural and Political Roots of Mediation in China

For more than two thousand years, mediation, or *tiaojie*, has been the primary means of resolving disputes in China.²⁵ The popularity of mediation

Chinese courts resolved one million civil and economic cases within its courts through mediation, constituting 61.5% of all the matters handled by the courts in that year. *See id.*

²³ *See id.*

²⁴ Ancient Chinese Proverb.

as a method of dispute resolution in China is a product of primarily three related but distinct sociopolitical forces—Confucian philosophy, an inadequate and underdeveloped legal system, and Maoist principles. Each of these factors, which are grounded in both the cultural values and the historical development of China, discouraged the use of formal litigation and fostered the resolution of disputes through private settlement, often with the assistance of a third party.

1. *Confucian Philosophy*

Confucian philosophy, which dominated Chinese culture for more than two thousand years and is still a significant force in modern Chinese society,²⁶ traditionally encouraged individuals to settle their disputes privately and, if necessary, involve the community, extended family, clans, and guilds for dispute resolution assistance.²⁷ Confucius taught that the primary goal of all human endeavors, including government, is to promote and preserve the natural harmony that existed among men and between man and nature.²⁸ It was a person's duty, according to Confucius, to preserve harmony through one's behavior, guided by the rules of polite conduct (*li*).²⁹ Litigation, a form of conflict, disrupted the natural harmony and amounted to

²⁵ Justice Robert F. Utter, *Dispute Resolution in China*, 62 WASH. L. REV. 383, 384–87 (1987). At least one commentator has emphasized the importance in distinguishing between *external* dispute resolution and *internal* dispute resolution within the Chinese society. See Donald C. Clarke, *Dispute Resolution in China*, 5 J. CHINESE L. 245, 248–49 (1991). External dispute resolution refers to a third party (mediator, arbitrator, or adjudicator) “who has no distinct relationship with the parties other than a specialized function as a dispute resolver.” *Id.* at 248. Internal dispute resolution refers to a circumstance where the dispute resolver “has authority not because of [her] specialized function as dispute resolver but because of some other distinct relationship with the parties,” for example, a family member or an executive of a company resolving a dispute between two subordinate employees. *Id.* It is suggested that where internal resolution is used the lines between mediation, arbitration, and adjudication are blurred because “the dispute resolver is in a position to impose an outcome no matter what mode is ostensibly used.” *Id.* at 249. A discussion of internal dispute resolution is beyond the scope of this Article.

²⁶ See Utter, *supra* note 25, at 384, 387; see also Ren Jianxin, *Mediation, Conciliation, Arbitration and Litigation in the People's Republic of China*, in CONTRACT, GUANXI, AND DISPUTE RESOLUTION IN CHINA 363, 363 (Tahirih V. Lee ed., 1997).

²⁷ See Robert Perkovich, *A Comparative Analysis of Community Mediation in the United States and the People's Republic of China*, 10 TEMP. INT'L & COMP. L.J. 313, 316 (1996); Utter, *supra* note 25, at 386.

²⁸ See Perkovich, *supra* note 27, at 314.

²⁹ See *id.*

"a public admission of some personal failing" ³⁰ The Chinese therefore came to embrace compromise or yielding (*jang*) as the socially acceptable way to resolve disputes, which "requires one to yield on some points in order to gain some advantage on others." ³¹ Another Confucian principle which influences conflict resolution is the "spirit of self-criticism." One who assumes a spirit of self-criticism examines his conduct to determine whether it is the cause of the conflict. ³² This humbling act, in turn, invokes a positive response from the other party and hopefully leads to harmony. ³³ Thus, mediation always has been consistent with Confucian values.

2. *An Inadequate and Under-Developed Court System*

The popularity of mediation in imperial China was in large measure also attributable to an inaccessible and inadequate court system. ³⁴ Many localities had no court, and litigants often were forced to travel great distances to lodge formal civil claims. ³⁵ If litigants could overcome the obstacle of distance or were fortunate enough to live close to courts, their case was handled by magistrates or magistrate assistants that had no legal training and who often were corrupt. ³⁶ The magistrates or their assistants were known to accept bribes and extort "customary fees" from litigants, which led to a general distrust of the courts and which gave rise to the expression "win your lawsuit and lose your money." ³⁷ Magistrates also were frequently "harsh and degrading" to litigants. ³⁸ It was not unusual for the court to use torture to obtain evidence from a litigant or to incarcerate him pending trial and during a prolonged appeal process. ³⁹

Despite the advent of the rule of law (*fa*) during the third century B.C., which slowly wove its way into Confucian principles, imperial China retained its strong bias against lawsuits embodied in Confucian principles. ⁴⁰ Imperial rulers were unconcerned with the inadequacies and corruption that plagued the court system. Imperial philosophy toward litigation and the

³⁰ Utter, *supra* note 25, at 385.

³¹ Perkovich, *supra* note 27, at 315.

³² *See id.*

³³ *See id.*

³⁴ *See* Utter, *supra* note 25, at 386.

³⁵ *See id.* at 385.

³⁶ *See id.*

³⁷ *Id.*; *see also* Perkovich, *supra* note 27, at 316.

³⁸ Utter, *supra* note 25, at 385.

³⁹ *See id.* at 385-86.

⁴⁰ *See id.* at 384.

frequent abuses of the courts are captured in a statement made by the K'ang-hsi Emperor (1662–1722):

[L]awsuits would tend to increase to a frightful amount, if people were not afraid of the tribunals, and if they felt confident of always finding in them ready and perfect justice I desire, therefore, that those who have recourse to the tribunals should be treated without pity, and in such a manner that they shall be disgusted with [the] law, and tremble to appear before a magistrate.⁴¹

Such sentiments paint a grim picture of the plight of litigants in imperial China and, not surprisingly, encouraged mediation's widespread use and popularity.

3. Maoist Thought

With the onset of communism in China in the twentieth century, the popularity and acceptance of mediation continued as it was, viewed as furthering the notions of social harmony which characterize communist thought. After the overthrow of the Ch'ing Dynasty in 1911, China was embattled in a tumultuous and bloody political struggle over the country's leadership, from which the Communists ultimately emerged victorious.⁴² As a result, the People's Republic of China was established in 1949 under the leadership of Mao Zedong (Mao), and the process of creating a new legal system modeled after the former Union of Soviet Socialist Republics began.⁴³

Mao immediately recognized how the deeply rooted Confucian concepts of compromise and self-criticism mirrored and served communist ideals and goals.⁴⁴ Analogous to Confucian thought, Mao believed that in a communist society, individual interests should be de-emphasized in favor of promoting social harmony and the common good on behalf of society as a unit. Therefore, disputes between individuals in a communist society should be "resolved not through defeat of one party over the other, but by the movement of both to a new plane of unity higher than the one out of which

⁴¹ *Id.* at 386 (quoting Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1215 (1966) (quoting THOMAS R. JERNIGAN, CHINA IN LAW AND COMMERCE 191 (1905) (quoting statement of the K'ang hsi Emperor)).

⁴² See Perkovich, *supra* note 27, at 317.

⁴³ See *id.*

⁴⁴ See *id.* at 318.

the [dispute] originally developed.”⁴⁵ Thus, the Communist party adopted mediation as a means to promote social harmony and control, conducting mediation with the assistance of “party cadres”⁴⁶ or People’s Mediation Committees (Committees).⁴⁷ In addition to resolving disputes and avoiding the cost, delay, and “undesirable dissonance” of litigation, mediation by party members or organizations also served as a means of “educating” the people and implementing party policy.⁴⁸

B. Mediation in Modern China

Mediation continues to be China’s most popular method for resolving disputes⁴⁹ and is an integral part of civil procedure in its court system.⁵⁰ Unlike the United States, the Chinese judiciary is not a separate, coequal branch of government within the Chinese legal system, but rather one of many “arms” of the central government, lacking the independence, power, and prestige often associated with our court system.⁵¹ Litigation in this environment often is perceived as lacking the impartiality and fairness that Americans typically enjoy and contributes to the preference of the Chinese for mediation. Although China is seeking to create a more modern legal system committed to the rule of law in order to engender greater confidence in its ability to adjudicate cases fairly, for the benefit of its own citizens as

⁴⁵ Clarke, *supra* note 25, at 286.

⁴⁶ “Party cadres” are party members or government or quasi-government officials. See Utter, *supra* note 25, at 387.

⁴⁷ See Clarke, *supra* note 25, at 270.

⁴⁸ Perkovich, *supra* note 27, at 318.

⁴⁹ See *id.* at 313.

⁵⁰ See Clarke, *supra* note 25, at 270. The other prominent forum for mediation is in the Committees. The 1982 Constitution required that all resident and village committees create People’s Mediation Committees to serve as alternate forums to the people’s courts. See Perkovich, *supra* note 27, at 321. Committees are by far the most widely used forums for mediation in China. See *id.* It is estimated that for every civil dispute filed in court “five or ten are resolved by the Committees.” *Id.* Embodying the Confucian principles of “harmony and yielding,” the Committees are required to be formed within all neighborhoods, villages, and workplaces with the purpose of mediating minor civil and criminal disputes. *Id.*; see also Clarke, *supra* note 25, at 276. The Committees operate under the supervision of China’s lower-level courts and are considered quasi-governmental entities, utilizing mediators elected from the community in which the committee functions. See Perkovich, *supra* note 27, at 324; see also RONALD C. BROWN, UNDERSTANDING CHINESE COURTS AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS 22 (1997); Clarke, *supra* note 25, at 276–79.

⁵¹ See Susan Finder, *The Supreme People’s Court of the People’s Republic of China*, 7 J. CHINESE L. 145, 148 (1993).

well as to compete in the international economic market, it is still deeply committed to the concept of institutionalized mediation.⁵²

1. *The Role and Structure of the Court*

Litigants regard litigation in China as often arbitrary and unpredictable, inspiring little confidence in the results obtained there. There are a variety of factors contributing to this view, including corruption among judges and the lack of an organized, published, and accessible digest of applicable law to support a claim.⁵³ Furthermore, the policy, functioning, and, not infrequently, the decisions of the court are influenced by other branches of the government or the Communist party either directly or indirectly, undermining its power and independence.⁵⁴ The perceived lack of impartiality among China's judges, coupled with their poor education and training, creates a rather unreliable environment for litigants seeking to protect or vindicate their rights. Moreover, enforcement of judgments is often very difficult and complicated, leaving a successful litigant without the benefit of a practical remedy.⁵⁵

Despite their constitutionally proclaimed judicial power, independence, and prestige,⁵⁶ China's courts possess little of these characteristics. The

⁵² See BROWN, *supra* note 50, at 26; Jianxin, *supra* note 26, at 364 (stating that the people's courts of China "have tried to combine mediation with litigation in the best possible way"). *But see* Perkovich, *supra* note 27, at 320. The Chinese principle of "mediation first, litigation second" has come under scrutiny. See Fu Hauling, *Understanding People's Mediation in Post-Mao China*, 6 J. CHINESE L. 211, 219 (1992). Institutionalized encouragement of mediation, however, is seen by some to be a "barrier" to establishing the rule of law because it promotes a system of civil justice that de-emphasizes legal rights. *Id.* at 221 (citing Zhang Xingzhong, *Zhuozhong Taijie Yuanze Zhi Wojian* [My Opinion About the Principle of Emphasizing Mediation], FAZHI RIBAO [LEGAL DAILY], May 22, 1990, at 1). Mediation also is seen as preventing economic development because "'primitive, unlimited, and repeated mediation slows down the capital turnover, wastes energy and damages the economy.'" *Id.* (quoting Xingzhong, *supra*, at 1). Finally, it is argued that because mediation is principally "ideological work" and not based on the rule of law, it stymies the development of the legal profession, especially judges whose professional skills will not be enhanced. *Id.*

⁵³ See Clarke, *supra* note 25, at 258-64.

⁵⁴ See Jerome A. Cohen, *Reforming China's Civil Procedure: Judging the Courts*, 45 AM. J. COMP. L. 793, 798 (1997).

⁵⁵ See Clarke, *supra* note 25, at 263-64.

⁵⁶ The Chinese Constitution states that the people's courts are the "judicial organs of the state," ZHONGUA RENMIN GONGHEGUO XIANFA [Constitution of the People's Republic of China] art. 123 (1982), and that "[t]he people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals," *id.* art. 126.

judiciary is not a separate branch of government in the traditional separation of powers model, but rather one of many distinct governmental organs answerable to several different political entities, the most prominent of which are the National People's Congress (NPC), the local government, and the Communist party.⁵⁷

The NPC is the supreme legislature of China.⁵⁸ The NPC and its executive body, the Standing Committee, are empowered constitutionally to "supervise" the court.⁵⁹ Although there is academic debate within China over whether, in the exercise of its supervisory role, the NPC can inquire into the merits of ongoing litigation, it does so regularly.⁶⁰ Typically, however, the NPC will inquire only into litigation that involves a controversial issue.⁶¹ In such a case, the NPC representative for the district in which the case is venued will write the court a proposal as to how the matter might be resolved, to which the court must reply within three months.⁶² Additionally, while all courts are part of a national system, each is also part of the corresponding level of government that it serves. Accordingly, each level of government, whether county, city, or central, exerts considerable control over the corresponding court's work because it provides for court facilities, personnel, and finances.⁶³

It is the Communist party, however, that exerts the greatest influence on the courts.⁶⁴ The Communist party, through its central legal committee and committees at the corresponding level of government, sets legal policy and closely supervises the courts' work.⁶⁵ The "supervisory" role of the Communist party at times has included direct involvement with important judicial cases, although the stated policy of the Communist party is not to interfere with the daily functioning of the courts.⁶⁶ Judges are required to

⁵⁷ See Finder, *supra* note 51, at 148–50.

⁵⁸ See Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 731–32, 733–34 (1994). The NPC and its executive body, the Standing Committee, are the only arms of Chinese government that may enact national laws. *See id.* at 721.

⁵⁹ ZHONGUA RENMIN GONGHEGUO XIANFA art. 67, § 6 (1982).

⁶⁰ See Finder, *supra* note 51, at 153.

⁶¹ *See id.*

⁶² *See id.*

⁶³ See Keller, *supra* note 58, at 754.

⁶⁴ See Finder, *supra* note 51, at 148–52.

⁶⁵ *See id.* at 149.

⁶⁶ See ZHONGUA RENMIN GONGHEGUO XIANFA art. 67, § 6 (1982); Cohen, *supra* note 54, at 797–98; Finder, *supra* note 51, at 151–53. The Communist party's Central Committee issued a directive in 1979 indicating that it would not interfere with the "day to day operation of the court or in individual cases, but rather would monitor judicial

attend party meetings to keep informed of current party policy, and ninety percent of them, because of the sensitive job they perform, are party members.⁶⁷

Like most legal systems with a civil law approach, the judiciary consists of career civil servants.⁶⁸ Unlike many other civil law countries, however, China's judges have a history of being poorly educated and often corrupt, reflecting poorly on the quality of the courts.⁶⁹ Judges, as career civil servants, serve at the pleasure of the county, province, or city government that appointed them,⁷⁰ and they preside over a unified system of courts consisting of four levels of general jurisdiction courts and various specialized courts.⁷¹ As a consequence of judges' affiliations with local government, political and local authorities can, and often do, exert significant influence over judicial decisions.⁷² Thus, local protectionism, from which local residents may derive distinct advantages in litigating with an "outsider" or foreign country, is also a genuine concern.⁷³ Court personnel, including

work and exercise leadership only under general policy guidance." BROWN, *supra* note 50, at 128.

⁶⁷ See Finder, *supra* note 51, at 149; see also Cohen, *supra* note 54, at 797.

⁶⁸ See Cohen, *supra* note 54, at 795.

⁶⁹ See *id.* at 795–97.

⁷⁰ See Clarke, *supra* note 25, at 254–55.

⁷¹ See *id.* at 253; see also Donald C. Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COLUM. J. ASIAN L. 1, 7 (1996). The two lower general jurisdiction courts typically serve as courts of first instance. See *id.* at 7. The Supreme People's Court (*Zuigao Renmin Fayuan*), controlled by the central government, is the highest court in China and has supervisory power over and sets policy for all other courts. See *id.*; see also ZHONGHUA RENMIN GONGHEGUO XIANFA art. 127 (1982) (stating that the "Supreme People's Court supervises the administration of justice by the local people's courts at different levels and by the special people's courts; people's courts at higher levels supervise the administration of justice by those at lower levels"); Finder, *supra* note 51, at 163 (observing that the term "supervision" is a term of art in Chinese politics and contrasting that term with the word "lead"). Each province, centrally administered city, and autonomous region has a Higher Level People's Court (*Gaoji Renmin Fayuan*). See Clarke, *supra*, at 7. Underneath the Higher People's Courts are the Intermediate Level People's Courts (*Zhongji Renmin Fayuan*), which are present within centrally administered cities, prefectures, and provincially administered cities. See *id.* Finally, at the county level reside the lowest levels of courts called the Basic Level People's Courts (*Jiceng Renmin Fayuan*). See *id.* Basic Level People's Courts, however, are permitted to establish branch courts known as People's Tribunals (*Renmin Fating*) in outlying or remote areas. See *id.* at 7. Judgments rendered in People's Tribunals are of the same force and effect as Basic Level People's Courts and if appealed are brought to the Intermediate Level People's Courts. See *id.*

⁷² See Clarke, *supra* note 25, at 262–63.

⁷³ See *id.* (discussing influence by local government); Cohen, *supra* note 54, at 799–800 (discussing local protectionism).

judges, need not have legal training and until only recently did not have to satisfy any minimum educational requirements.⁷⁴ Although there is a movement currently underway to improve the quality of China's judiciary by providing for minimum educational requirements, training, and examination, many of the judges presently sitting are poorly educated, especially at the Basic Level People's Court where the majority of first instance cases are adjudicated.⁷⁵

Even when a judge has the appropriate legal education and training, finding applicable law to support one's claim is often a daunting, if not impossible, task. Updated indexes are often not available to facilitate locating applicable law.⁷⁶ There are frequently no statutes relevant to the disputed issue and the laws that are in place are sometimes contradictory.⁷⁷ To further complicate the judge's task, there is no systematic and reliable method of case reporting.⁷⁸

A Chinese litigant's obstacles to securing civil justice, however, do not end with obtaining a valid judgment against her adversary, as civil judgments are often difficult to enforce for several reasons. Unlike the United States, there are few penalties in China for disregarding a court judgment or order.⁷⁹ Courts also lack sufficient political authority to enforce judgments against administrative agencies because in general, the executive arm of government is more powerful than the judiciary.⁸⁰ Finally, local authorities, upon which the courts must rely to enforce judgments, are typically reluctant to coerce payment of the judgment.⁸¹ This is especially true when the judgment is from

⁷⁴ See Cohen, *supra* note 54, at 794-96.

⁷⁵ See *id.*; see also Clarke, *supra* note 25, at 257-60.

⁷⁶ See Clarke, *supra* note 25, at 258-59. China is making strides in remedying the problem of the lack of an organized and accessible body of law upon which judges can rely to adjudicate disputes with a reasonable degree of consistency. In particular, since 1978 China has expended considerable effort to codify its contract law. See Zhong Jianhua & Yu Guanghua, *China's Uniform Contract Law: Progress and Problems*, 17 UCLA PAC. BASIN L.J. 1, 3-9 (1999) (detailing China's various efforts to codify and modernize its contract law). Most recently, on March 15, 1999, China enacted the Contract Law of the People's Republic of China (*Zhonghua Renmin Gongheguo Hetongfa*), which is the most detailed and ambitious attempt China has made to organize its contract law to date. See *id.* at 2.

⁷⁷ See Clarke, *supra* note 25, at 259. The primary reason for the difficult and incomplete means of ingress into Chinese law is that laws and regulations are passed by a "bewildering" variety of governmental and quasi-governmental agencies. *Id.* at 258.

⁷⁸ See *id.* at 258-59.

⁷⁹ See *id.* at 263-64.

⁸⁰ See *id.* at 265.

⁸¹ See *id.* at 265-66.

a different province or city because of local protectionism.⁸² Thus, lack of enforcement devices, insufficient political clout, and local protectionism combine to make enforcement of civil judgments an uncertain enterprise.

Corruption by officials in China is another serious concern that extends to the judiciary, although it is difficult to assess the magnitude of the problem.⁸³ Corruption can range from stretching procedural rules for friends and neighbors to more serious transgressions of accepting bribes to affect the outcome of the dispute.⁸⁴ One commentator relates that it is not uncommon for a lawyer to take key judges on "fact-finding" trips *ex parte* that involve accommodations at expensive hotels and restaurants that are paid for by the litigant.⁸⁵ Accordingly, political influences, the lack of educated judges who are able to find and apply the law, widespread corruption and favoritism, and judgment enforcement issues combine to create a rather suspect and unpredictable court system.⁸⁶

2. Civil Procedure and Mediation

Given the historical unreliability of the litigation process in China, it is not surprising that mediation plays a central role in China's ordinary procedure for resolving civil disputes.⁸⁷ China's present Code of Civil Procedure was adopted officially in 1991 after functioning almost ten years on a provisional basis,⁸⁸ and an entire section of the Code is dedicated to describing mediation's proper use, evidencing its prominence in China's ordinary civil procedure.⁸⁹ Participation in mediation is voluntary, but judges

⁸² See *id.* at 266–67.

⁸³ See *id.* at 259–60.

⁸⁴ See Cohen, *supra* note 54, at 801.

⁸⁵ See *id.* China's Civil Procedure Law prohibits a judge from "accepting a treat or gift from the parties or their agents *ad litem*," and a recently enacted Judges Law also prohibits judges from accepting bribes and other unsavory practices. Margaret Y. K. Woo, *Law and Discretion in the Contemporary Chinese Courts*, 8 PAC. RIM L. & POL'Y J. 581, 599 (1999). Despite these prohibitions and an increased commitment to the rule of law, corruption is still seen as a significant problem in the Chinese judiciary. See *id.* at 582, 599.

⁸⁶ See Clarke, *supra* note 25, at 257–68.

⁸⁷ The general category of civil cases subject to mediation "include[s] disputes over property and status arising under civil law or the Marriage Law, as well as disputes arising under economic law and labor law." Clarke, *supra* note 25, at 256.

⁸⁸ See ALBERT HUNG-YEE CHEN, INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 152 (1992).

⁸⁹ See ZHONGHUA RENMIN GONGHEGUO MINSHI SUSONG FA [Civil Procedure Law of the People's Republic of China] [hereinafter Civil Procedure Law] arts. 85–90. Concerning China's procedure for litigation, a court of first instance can adjudicate a

occasionally employ subtle, and sometimes more forceful, pressures to encourage parties to mediate disputes.⁹⁰ Participation in mediation is commonly expected of and anticipated by parties and is viewed by the courts to be an efficient way to resolve disputes and promote social stability.⁹¹

The mediation process itself, which typically is conducted by a single judge even if a collegiate panel of judges ultimately will hear the matter in the event that a resolution cannot be reached, is informal and bears close resemblance to an American settlement conference. While there is no parallel provision in the United States Federal Rules of Civil Procedure requiring a judge to apply a particular set of values or even the law to facilitate a settlement, in practice a Chinese mediation proceeds very much like a settlement conference in America. The most similar feature between the two processes is that neither employs a uniform method or system by which the mediation or settlement is conducted.⁹² In both systems, it is left to the

dispute in either an "ordinary procedure of first instance" or a "summary procedure." CHEN, *supra* note 88, at 170. The summary procedure is merely a simplified version of the ordinary procedure. *See id.* The case is heard by a single judge and may be presented orally with no formal court investigation or debate, as are held in the ordinary procedure. *See id.* at 172. The summary procedure is thought to be used in as many as 80% to 90% of all civil cases adjudicated by the Basic Level People's Courts, although its widespread use has come under some criticism. *See id.*

A civil action is commenced under the ordinary procedure by filing a writ with the court. *See id.* at 170. If the court determines after examining the writ that the requirements of a proper civil action have been met, it must commence the action within seven days. *See id.* The writ is then served upon the defendant by the court, who has an opportunity to file a defense. *See id.* The litigant is under an obligation to provide the court with evidence to support his claim, although the court is under an obligation to "investigate and collect" evidence it deems "necessary for the adjudication of the case or which the litigant . . . is unable to collect." *Id.* (citing Civil Procedure Law art. 64).

Generally, civil cases are tried by a collegiate bench composed of judges or of judges and "people's assessors" who are selected from the community, although minor civil matters may be tried by a single judge. *See Clarke, supra* note 71, at 11. Additionally, each court has an "adjudication committee," composed of the court president, vice president, and other important judges. *See id.* The adjudication committee typically handles only particularly "sensitive" or "difficult" cases, but it also has the power to overrule a verdict reached by a judge or collegiate panel within its court or a lower court within its jurisdiction. Cohen, *supra* note 54, at 798. There is generally only one appeal to the court of the next highest level. *See CHEN, supra* note 88, at 173. A collegiate bench will review the appeal *de novo*, with or without a hearing, and its decision is final. *See id.*

⁹⁰ Interview with Zhu Zeng Jin, Visiting Scholar, New York University School of Law, in New York, N.Y. (Mar. 10, 1999).

⁹¹ Interview with Jie Jie, Research Fellow, Institute of China Studies at New York University School of Law, in New York, N.Y. (Mar. 10, 1999).

⁹² *See* Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 61-66 (1992); *see also* William L. Adams, Comment, *Let's*

judge's discretion as to when, how long, and in what manner to conduct mediation or a settlement conference.⁹³ This obviously leads, in both systems, to great disparity in how each process is conducted even within each system. Nevertheless, the Chinese judge uses many settlement techniques that would be very familiar to his American counterpart. Chinese judges often will meet separately with parties, something referred to in American mediation terminology as "caucusing."⁹⁴ The judge sometimes will suggest a settlement proposal he or she believes would be fair or point out to the parties the particular weaknesses of their claim or defense, giving them cause to re-evaluate the strength of their position.⁹⁵ Finally, a judge might simply, as is done so often in the United States, emphasize the potential economic benefits of a particular settlement whereby a litigant can avoid the additional legal expense and uncertainty of court adjudication.⁹⁶

Chinese mediation differs from the American settlement conference in a few ways. Article 85 of the Code of Civil Procedure of the People's Republic of China provides that "[w]hen hearing a civil case, a people's court shall . . . conduct mediation on the basis of clear facts and distinguishing from right and wrong."⁹⁷ Thus, within the theoretical framework of the mediation process is an evaluative element in which the judge applies a set of normative values to help facilitate settlement—values that are rooted in both the judge's cultural and legal experience.⁹⁸ It is also of interest to note that Chinese court mediation sessions are conducted at no additional expense to the litigant, and, depending on the needs of the particular dispute, the court may call witnesses⁹⁹ and request assistance of "relevant units" and other individuals.¹⁰⁰ However, since mediation most often occurs after the fact-finding process, and thus after witnesses already have been heard, mediation usually proceeds only with the parties.¹⁰¹

Generally, when a settlement is reached through mediation, the court is required to draft a "mediation statement" that "clearly states the claims of the

Make a Deal: Effective Utilization of Judicial Settlements in State and Federal Courts, 72 OR. L. REV. 427, 450 (1993); Interview with Zhu Zeng Jin, *supra* note 90.

⁹³ See Adams, *supra* note 92, at 450–51; Interview with Zhu Zeng Jin, *supra* note 90.

⁹⁴ See Adams, *supra* note 92, at 446–52.

⁹⁵ See *id.* at 448.

⁹⁶ See *id.* at 450.

⁹⁷ Civil Procedure Law art. 85.

⁹⁸ Interview with Zhu Zeng Jin, *supra* note 90.

⁹⁹ See Civil Procedure Law art. 86.

¹⁰⁰ *Id.* art. 87.

¹⁰¹ Interview with Zhu Zeng Jin, *supra* note 90.

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action, case facts and mediation conclusion."¹⁰² Once signed by the parties and delivered, the mediation agreement has the force and effect of a court judgment and may not be appealed.¹⁰³ If pretrial attempts at mediation are unsuccessful, the dispute proceeds to trial "without delay."¹⁰⁴ Settlements obtained through mediation are in some degree more valuable than adjudicated court judgments because they cannot be appealed and are voluntary, and thus there is a greater likelihood that all parties involved will abide by the settlement.¹⁰⁵ This is of particular importance because judgments are often difficult to enforce in China.¹⁰⁶

III. MEDIATION IN THE UNITED STATES FEDERAL DISTRICT COURTS

*"A Government of Laws and Not of Men"*¹⁰⁷

A. *Cultural Roots and Statutory Basis for ADR in Federal District Courts*

Culturally, modern Americans are uneasy with the concept that justice is possible outside of traditional litigation.¹⁰⁸ In this individualistic and culturally diverse society, the law represents common values, and the ability

¹⁰² Civil Procedure Law art. 89. A court need not draft a mediation statement in the following instances: (1) a divorce case in which the parties become reconciled following mediation; (2) a case in which an adoptive relationship is maintained following the mediation; (3) a case in which claims can be fulfilled immediately; and (4) other cases which do not require a mediation statement. *See* Civil Procedure Law art. 90.

¹⁰³ *See id.* arts. 89, 91.

¹⁰⁴ *Id.* art. 91. The first stage of trial is the "court investigation." *See* CHEN, *supra* note 88, at 172 (citing Civil Procedure Law art. 124). During the court investigation, the court typically questions witnesses, reads statements of witnesses who could not attend, and reviews documentary and material evidence presented by the parties. *See id.* (citing Civil Procedure Law art. 124). The "court debate" follows the investigation, which involves written and oral arguments by the parties. *See id.* (citing Civil Procedure Law art. 127). Before the court renders a judgment, it will attempt, once again, to settle the matter through mediation if it believes settlement is still possible. *See id.* (citing Civil Procedure Law art. 128). The time limit for resolving a dispute under the ordinary procedure is six months from the court's decision to initiate the action. *See id.* (citing Civil Procedure Law art. 135).

¹⁰⁵ *See* Clarke, *supra* note 25, at 257.

¹⁰⁶ *See* Clarke, *supra* note 71, at 34–81 (discussing problems associated with the execution of judgments in China).

¹⁰⁷ ADAMS, *supra* note 3, at 106.

¹⁰⁸ *See* AUERBACH, *supra* note 4, at 11.

to sue thy neighbor is a cherished right.¹⁰⁹ The rule of law so dominates our culture that it has been characterized as a “national religion” where “lawyers constitute our priesthood; the courtroom is our cathedral, where contemporary passion plays are enacted.”¹¹⁰

The settling of disputes outside of traditional litigation and the courts, however, is not a wholly alien concept to Americans. Many groups in our nation’s past preferred mediation or arbitration to resolving their disputes publicly within the courts.¹¹¹ For example, early colonial settlers like the Dutch in New Amsterdam and the puritans of Massachusetts Bay as well as colonial settlements in Connecticut, Pennsylvania, and South Carolina used and preferred mediation or arbitration to resolve disputes.¹¹² As the economic and social landscape of America changed and its population grew and became more diverse, however, the rule of law changed and grew with it, pervading and dominating our relationships.¹¹³

In the early part of the twentieth century, a rallying call came from Roscoe Pound, eminent legal scholar and professor of law at Harvard University, to re-evaluate the ability of law to remedy every social problem.¹¹⁴ “When men demand much of law,” Pound warned, “when they seek to devolve upon it the whole burden of social control, . . . enforcement of law comes to involve many difficulties.”¹¹⁵ Pound’s commentary on the role of law in our society heralded reform within the legal system and renewed interest in alternative ways of resolving disputes, such as arbitration and mediation, also known as “conciliation.”¹¹⁶

In the decades that followed, ADR gained popularity as a beneficial means of resolving certain types of disputes. For example, several states and some municipalities created mediation programs to resolve labor-management disputes,¹¹⁷ and by the 1930s and 1940s, the use of grievance procedures and arbitration to resolve unionized labor disputes was practiced routinely throughout the United States.¹¹⁸ Arbitration and conciliation also

¹⁰⁹ See *id.* at 10.

¹¹⁰ *Id.* at 9.

¹¹¹ See *id.* at 19–46 (discussing dispute resolution outside the courtroom context in colonial America).

¹¹² See *id.*

¹¹³ See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW* 165–66 (1994).

¹¹⁴ See AUERBACH, *supra* note 4, at 96.

¹¹⁵ *Id.* (alteration in original) (quoting statement of Roscoe Pound).

¹¹⁶ See *id.*

¹¹⁷ See LINDA R. SINGER, *SETTLING DISPUTES* 6 (1994).

¹¹⁸ See *id.* In 1947 Congress created the Federal Mediation and Conciliation Service, an agency specifically dedicated to the resolution of labor disputes. See *id.*

found a footing in the changing legal environment. Arbitration was the more successful of the alternative means of resolving disputes, eagerly accepted by contracting parties in the commercial arena as potentially offering speedier and more inexpensive procedures, free from lawyers.¹¹⁹ Several cities and communities, on the other hand, adopted conciliation programs as an alternative means for the urban poor who could not afford to pay the expense of traditional litigation or confront the delays often associated with it.¹²⁰ At that time, however, ADR was not widely encouraged or promoted by the federal legislature or the federal courts.

This began to change in 1976, however, when Chief Justice Warren E. Burger of the United States Supreme Court organized the Roscoe E. Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (“Pound Conference”).¹²¹ This conference revisited ideas raised by Pound sixty years earlier questioning the ability of the courts to solve all of society’s ills and advocating alternative ways of resolving disputes.¹²² The Pound Conference, which perhaps was convened in response to the litigation explosion experienced by the United States in the 1960s,¹²³ was the first major step by the federal government to address formalizing ADR procedures in the federal courts. As such, the Pound Conference generally is considered the birth of the modern ADR movement.¹²⁴ The conference brought together judges, legal scholars, lawyers, court administrators, and community leaders to discuss a variety of issues affecting the administration of justice in America, including concern over the increasing volume of litigation, access to the courts, and fairness and appropriateness of procedures.¹²⁵

During the last few decades since the Pound Conference, the federal legislature and federal judiciary have initiated a more organized movement to develop formalized alternative dispute resolution techniques and to establish effective institutions for their implementation.¹²⁶ In the 1970s, federal district

¹¹⁹ See AUERBACH, *supra* note 4, at 101–02.

¹²⁰ See *id.* at 97. Cleveland, New York, Chicago, and Philadelphia all implemented conciliation programs during the early decades of the twentieth century. See *id.* at 97–98. While well intentioned, such a system obviously, and rightly, drew criticism for creating a “two-tier justice system,” one for the poor and one for the more affluent. *Id.* at 100–01.

¹²¹ See SINGER, *supra* note 117, at 6–7.

¹²² See AUERBACH, *supra* note 4, at 123.

¹²³ See JUDICIAL CONFERENCE OF THE U.S., *supra* note 5, at 10 (indicating that a significant increase in litigation occurred in the 1960s).

¹²⁴ See AUERBACH, *supra* note 4, at 123.

¹²⁵ See SINGER, *supra* note 117, at 7.

¹²⁶ See *id.*

courts sporadically began instituting mediation and arbitration programs.¹²⁷ In 1988, as a pilot program for studying ADR techniques, Congress authorized ten federal district courts to establish mandatory arbitration programs and ten other districts to establish voluntary arbitration programs.¹²⁸

Thereafter, Congress passed The Civil Justice Reform Act of 1990¹²⁹ (CJRA), which was the major impetus for federal district courts to implement systematic ADR programs.¹³⁰ The CJRA mandated the creation of an advisory committee in all district courts to address ways of reducing the cost and delay of civil litigation.¹³¹ To accomplish that goal, the CJRA specifically suggested, among other things, that the advisory committees consider the development of ADR programs in the federal district courts, such as mediation, mini-trials, and summary jury trials.¹³² As a consequence of the CJRA, almost all of the ninety-four federal district courts eventually developed some form of ADR.¹³³

The CJRA did not, however, require the federal courts to adopt ADR programs, and as a result, the nature of the programs adopted by the federal courts varied significantly from district to district and were implemented on a voluntary and often experimental basis.¹³⁴ More recently, perhaps to give ADR programs a greater presence and credibility within the federal court system, the legislature recently passed the Alternative Dispute Resolution Act of 1998¹³⁵ ("ADR Act"), which incorporated three new concepts for ADR programs in the federal courts. First, the ADR Act mandates all federal district courts to implement ADR programs.¹³⁶ Second, to the extent a district has a program, it must evaluate its effectiveness and adopt necessary improvements.¹³⁷ Third, the ADR Act requires the appointment of a judicial

¹²⁷ See PLAPINGER & STIENSTRA, *supra* note 8, at 3.

¹²⁸ See *id.* (citing 28 U.S.C. §§ 651–658 (1994)).

¹²⁹ 28 U.S.C. §§ 471–482 (1994 & Supp. II 1996).

¹³⁰ See SINGER, *supra* note 117, at 11.

¹³¹ See *id.*; see also 28 U.S.C. § 472.

¹³² See 28 U.S.C. § 471 note (1994) (Congressional Statement of Findings) (setting forth Congress's finding that "[e]vidence suggests that an effective litigation management and cost delay and reduction program should incorporate . . . utilization of alternative dispute resolution programs in appropriate cases").

¹³³ See SINGER, *supra* note 117, at 11.

¹³⁴ See PLAPINGER & STIENSTRA, *supra* note 8, at 3, 66.

¹³⁵ Pub. L. No. 105-315, § 2, 112 Stat. 2993 (1998).

¹³⁶ See *id.*

¹³⁷ See *id.*

employee with knowledge in ADR practices and procedures “to implement, administer, oversee, and evaluate” the ADR program.¹³⁸

It is particularly notable that the legislature specifically acknowledged in the ADR Act that for ADR programs to be effective they must be supported by the bench and bar and adequately administered by the court.¹³⁹ In other words, it is not sufficient for the federal courts simply to adopt ADR programs in theory; rather, the court also must embrace fully the concept that ADR can be a meaningful and effective, albeit different, manner of resolving disputes.

B. Mediation and Settlement in the Federal District Courts

While mediation can take on a variety of different forms in practice,¹⁴⁰ it generally can be defined as a nonbinding process in which an impartial third party “assists disputing parties in reaching a mutually satisfactory resolution.”¹⁴¹ Closely related to court-annexed mediation, yet distinct from it, is the judicial settlement conference.¹⁴² It is particularly relevant to include the judicial settlement conference in this general discussion of mediation because, as previously discussed, it procedurally resembles

¹³⁸ *Id.* The ADR act specifically directs the district courts to encourage the use of alternative dispute resolution and permits each district, if it wishes, to compel mediation and early neutral evaluation. *See id.*

¹³⁹ *See id.*

¹⁴⁰ Classic mediation is *facilitative*—“to help the parties find the solutions to underlying problems giving rise to the litigation.” PLAPINGER & STIENSTRA, *supra* note 8, at 65. In facilitative mediation, the mediator is an expert in process rather than the substance of the legal or factual matter at issue in the litigation. *See id.* Conversely, in *evaluative* mediation, the mediator assesses the potential outcome of the litigation as a settlement tool, often employing a special expertise in the particular area of law (e.g., securities regulation) or in a particular technical or scientific field (e.g., computer programming). *See id.* at 65–66. Most federal courts do not identify which form of mediation they utilize. *See id.* at 66; *see also* Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 53–54 (1996). Nolan-Haley observes a broad spectrum of views regarding the mediation process:

At one end of the spectrum is the instrumentalist vision of mediation as an efficient means of managing court calendars—a perfunctory process which settles cases and clears dockets. At the other extreme is a more noble vision of mediation as a process of moral development which helps individuals realize their ends and develop a stronger sense of efficaciousness.

Id. (citations omitted).

¹⁴¹ Nolan-Haley, *supra* note 140, at 52–53 (quoting KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 16–18 (1994)).

¹⁴² *See* PLAPINGER & STIENSTRA, *supra* note 8, at 65.

Chinese “mediation.”¹⁴³ Within the last decade, mediation has emerged as the most popular of the court-annexed federal ADR programs.¹⁴⁴ One of the hallmarks of mediation and one of the primary reasons for its relative popularity is its “capacity to expand traditional settlement discussion and broaden resolution options, often by going beyond the legal issues in controversy.”¹⁴⁵ It is a flexible process that is “tailorable” to a variety of disputes.¹⁴⁶

Although the way mediation programs are implemented within the federal district courts varies widely from district to district,¹⁴⁷ there are several general common characteristics that can be noted. The judge assigned to the case is typically responsible for determining whether the matter is appropriate for mediation.¹⁴⁸ Although the parties usually participate in the decision to submit the case to mediation, most districts permit the judge to order mediation without the consent of the parties.¹⁴⁹ Most federal district court mediators are nonjudicial personnel, serving the court on a part-time or ad hoc basis.¹⁵⁰ Federal court mediators “almost exclusively” are practicing attorneys who are selected from an official court mediator roster, appointed by the judge, or selected by the parties with the judge’s approval.¹⁵¹ Federal courts generally require some form of minimum experience, training, or certification of their mediators.¹⁵² The qualification and training requirements to be a mediator in the Federal District Court for the Southern

¹⁴³ See *supra* Part II.B.

¹⁴⁴ See PLAPINGER & STIENSTRA, *supra* note 8, at 4.

¹⁴⁵ Magistrate Judge J. Daniel Breen, *Mediation and the Magistrate Judge*, 26 U. MEM. L. REV. 1007, 1014 (1996) (quoting CENTER FOR PUB. RESOURCES, JUDGE’S DESKBOOK ON COURT ADR (Elizabeth Plapinger et al. eds., 1993)).

¹⁴⁶ Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303, 316 (1998).

¹⁴⁷ See generally PLAPINGER & SHAW, *supra* note 19; PLAPINGER & STIENSTRA, *supra* note 8.

¹⁴⁸ See PLAPINGER & STIENSTRA, *supra* note 8, at 66.

¹⁴⁹ See *id.* Most federal district courts refer cases to mediation on a case by case basis, in contrast to a few courts that refer cases on the basis of the nature of the dispute (e.g., personal injury or contract). See *id.* The rationale behind this is that the “ADR process is dependent upon many factors, most of which are unique to the controversy being considered” and includes such things as “the relationship of the parties and the attitude of the parties toward ADR . . .” PLAPINGER & SHAW, *supra* note 19, at 12. Additionally, nearly all districts “exclude certain categories of cases from mediation, such as administrative appeals, prisoner civil rights cases, and writs.” PLAPINGER & STIENSTRA, *supra* note 8, at 66.

¹⁵⁰ See PLAPINGER & STIENSTRA, *supra* note 8, at 9.

¹⁵¹ See *id.* at 66.

¹⁵² See *id.* at 9.

District of New York are typical in that a mediator "must have been a member of any state's bar for five years, be admitted to practice in the district, have completed the court's two-day mediation training, and be certified by the chief judge as competent to perform the duties of a mediator."¹⁵³ In the majority of districts, parties usually share equally in the cost of mediation, paying the mediator the market rate for her services, or they are charged a fee by the court, whether participation is voluntary or mandatory.¹⁵⁴

Currently, however, the judicial settlement conference is used much more widely in the federal courts as a means of achieving assisted, negotiated settlement.¹⁵⁵ Virtually all cases filed in the federal courts are resolved through settlement, and a significant portion of those disputes are resolved with the assistance of the court.¹⁵⁶ Long a part of the United States civil litigation experience, a federal judge's participation and facilitation of settlement negotiations "first was recognized formally only in the 1983" amendments to the Federal Rules of Civil Procedure.¹⁵⁷ The current form of Rule 16, which sets forth the objectives and parameters of the initial pretrial conference, specifically empowers the judge to facilitate settlement of the case.¹⁵⁸ Indeed, the judge's obligation to facilitate settlement is indicative of a trend in American jurisprudence of an increasingly active judiciary that generally has more control and responsibility over the pretrial process.¹⁵⁹

While the judicial settlement conference and court-annexed mediation arguably serve similar functions, the judicial settlement discussions are more closely associated with the adversarial process in which discussions concerning settlement and litigation planning may be commingled.¹⁶⁰ For example, judicial settlement discussions may occur in the Rule 16 settlement conference, in which there is also an opportunity for the parties to establish a discovery schedule, arrange for motion filing, and allow for the amendment of pleadings.¹⁶¹ While settlement discussions are an objective of the

¹⁵³ *Id.* at 200.

¹⁵⁴ *See id.* at 66.

¹⁵⁵ *See id.* at 65.

¹⁵⁶ *See Adams, supra* note 92, at 429 (citing 1990 ADMIN. OFF. CTS. ANN. REP. tbl. C-5).

¹⁵⁷ Arthur Miller, *Litigation in America Today*, WIS. B. BULL., Apr. 1988, at 9, 33.

¹⁵⁸ *See* FED. R. CIV. P. 16(c)(9).

¹⁵⁹ *See Adams, supra* note 92, at 433-35; *see also* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376-86 (1982).

¹⁶⁰ *See Adams, supra* note 92, at 428; *see also* David A. Rammelt, Note, "Inherent Power" and Rule 16: How Far Can a Federal Court Push the Litigant Toward Settlement?, 65 IND. L.J. 965, 970 (1990).

¹⁶¹ *See* FED. R. CIV. P. 16(c)(6), (7).

conference, settlement is approached on an ad hoc basis with little formal structure, and the litigants and judge attempt to reach a settlement by "sitting down and hammering out a satisfactory resolution through negotiation" ¹⁶² On the other hand, court-annexed mediation is intended to be a more structured process that employs systematic methods for facilitating settlement, usually conducted by a third-party neutral other than the judge. ¹⁶³

IV. CHINA'S COURT MEDIATION MODEL IN THE UNITED STATES FEDERAL DISTRICT COURTS

"Law is always more than rules, procedures, statutes and precedents, or courts and lawyers. It is, ultimately, an ideology, a set of beliefs and a system of integrated values" ¹⁶⁴

As can be seen from the history of China and the United States, legal procedures are interconnected with the culture in which they exist. ¹⁶⁵ Because procedures that govern dispute resolution are created by people living in a certain place at a certain time and who possess particular and identifiable values, ¹⁶⁶ they are "culture-specific." ¹⁶⁷ In China, it is not surprising that its historically strong preference for harmony coupled with the often inaccessible and unreliable court system have encouraged the voluntary resolution of disputes through mediation. It is equally understandable why, in the United States, with the widely shared belief in and adherence to the rule of law and the availability of a relatively predictable and respected court system to enforce it, Americans have come to value and rely on traditional litigation over all other forms of dispute resolution.

When comparing the Chinese and American court systems and the procedures each system has developed for resolving disputes, it is somewhat striking how, to a remarkable degree, each is a reverse image of the other, with each country seeking to improve its legal system by adopting qualities of the other. ¹⁶⁸ In China, legal reformers recognize the need for greater

¹⁶² Rammelt, *supra* note 160, at 970.

¹⁶³ *See id.*

¹⁶⁴ JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 142 (1983).

¹⁶⁵ *See Chase, supra* note 20, at 14.

¹⁶⁶ *See id.* at 14–15 (citing MIRJAN DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO LEGAL PROCESS* 8–23, 240–41 (1974–1975)).

¹⁶⁷ Oscar G. Chase, *Some Observations on the Cultural Dimension in Civil Procedure Reform*, 45 AM. J. COMP. L. 861, 866 (1997).

¹⁶⁸ *See Hauling, supra* note 52, at 211.

confidence in the Chinese judiciary through better training of judges, codification of laws, and systematic application of those laws, especially in light of its relatively recent economic growth and interaction with the world economic community.¹⁶⁹ By contrast, acknowledgement has been increasing in America that the rule of law and traditional litigation are not always the most effective means of resolving disputes, and there is a strong movement to promote alternative methods such as mediation.¹⁷⁰

As reforms proceed in each country, thoughtful consideration must be given to the impact such changes will have on their respective citizens and whether a proposed change is appropriate, given the culture of the receiving community. For example, if procedural reforms "depart from widely shared values in the relevant jurisdiction," they will not be well received.¹⁷¹ Furthermore, to the extent such reforms are implemented, any conflict with widely shared cultural values "will reduce public confidence in the validity of the legal system."¹⁷² Thus, as mediation procedures are developed and implemented in the United States federal courts, it should be considered whether such reforms will be accepted by American litigants, and, if so, given what is known about traditions and values regarding litigation, how to best implement such reforms so that public confidence in the legal system is not diminished.

In considering China's mediation process with these important principles in mind, there is evidence that the court-performed nature of that system would translate well to the federal courts, but a wholesale application of China's process would be inconsistent with longstanding values underlying the American judiciary. Until the federal district courts take more responsibility for directing the mediation process with the same dedication that has earned the courts their distinguished reputation in handling litigation, they may not witness the high level of public confidence in mediation that litigation enjoys. Because mediation currently is not being implemented in a court-performed fashion as in China, but rather in a court-annexed manner, this could be the reason why only a small percentage of American litigants voluntarily participate in mediation in the federal courts.

The courts must be careful, however, not to merge the concepts and procedures of litigation and mediation as China has done. Much of the strength of the rule of law in this country can be attributed to the fierce independence and impartiality of the judge presiding over the dispute. Expecting a judge to maintain an impartial distance from the dispute, yet at the same time, to solicit information regarding litigants' interests for

¹⁶⁹ See Cohen, *supra* note 54, at 795-96.

¹⁷⁰ See *supra* Part III.

¹⁷¹ Chase, *supra* note 167, at 866.

¹⁷² *Id.*

settlement purposes, places the judge in an awkward position and may cause litigants to be hesitant to share their concerns openly.¹⁷³ Developing mediation as a process separate from litigation, but fully supported, sanctioned, and encouraged by the federal courts, strikes the proper balance in presenting the fullest range of opportunity for litigants to settle their disputes as fairly and efficiently as possible.

A. *Acceptance of Mediation in America*

While the United States and China demonstrate vast cultural differences, both countries appear to value the settlement of disputes prior to litigation, though perhaps for different reasons. The Chinese place a high value on societal harmony and, as a culture, welcome settlement through mediation.¹⁷⁴ Even if a litigant in China were to hold a different philosophy from that of Confucius or communism, mediation nonetheless often would be preferred over litigation due to the unpredictability of the Chinese court system.¹⁷⁵ Although American litigants likely would not find themselves choosing mediation for the same reasons a Chinese litigant would, mediation and other settlement methods are still valued in the United States for the efficiency, flexibility, and risk avoidance that they afford.¹⁷⁶

The concept of negotiated settlement is not foreign to American litigants. Settlement is an integral part of the dispute resolution process in the federal courts and accounts for resolution of over ninety percent of all cases filed there.¹⁷⁷ As mediation is simply a process of negotiated settlement *with the assistance of a third party neutral*,¹⁷⁸ a practice in which litigants routinely participate, philosophical acceptance of institutionalized mediation in the United States is likely.

In particular, mediation offers a variety of benefits to the litigants. The primary impetus for the development of mediation programs in the courts was to ease docket congestion and provide litigants with speedier and more

¹⁷³ See Stephen Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U. L. REV. 279, 284 (1982) (stating that "[t]he separation of the mediatory function from the power to issue a final and binding decision . . . means that the parties need not fear that the facts disclosed to the mediator in an effort to obtain a settlement will be used against them in the event no settlement is reached").

¹⁷⁴ See *supra* Part II.

¹⁷⁵ See *supra* Part II.B.1.

¹⁷⁶ See GOLDBERG ET AL., *supra* note 13, at 92.

¹⁷⁷ See Adams, *supra* note 92, at 429.

¹⁷⁸ See GOLDBERG ET AL., *supra* note 13, at 91.

affordable results.¹⁷⁹ They have come to offer, however, much more. Equally important are such benefits as flexibility, control over outcome, and interest-based resolutions in which it is possible that a dispute can be resolved with both sides being "winners."¹⁸⁰ A trial does not offer such benefits. Although traditional litigation seeks to find "truth," many disputes are impervious to even the powerful "truth-revealing" function of litigation.¹⁸¹ In many circumstances, litigants are more than satisfied with harmony and reasonable compromise than with the chance at their "pound of flesh."¹⁸²

Moreover, there is also a growing understanding in American courts that various methods may be used for successfully resolving disputes, and different methods may be preferred depending upon the nature of the dispute.¹⁸³ For example, where the public revelation of "truth" is a party's primary concern, a trial might be the best way to resolve the dispute.¹⁸⁴ However, where maintaining a business or personal relationship with an adversary is of interest, mediation might be the appropriate choice, rather than highly contentious litigation.¹⁸⁵ One of the most basic functions of government is generally to assist in resolving disputes that its citizens cannot resolve on their own.¹⁸⁶ Adjudication is only one of many ways a government, and more particularly a court, can resolve a dispute,¹⁸⁷ and indeed, the vast majority of cases filed in federal court are never adjudicated.¹⁸⁸ A commentary in the Judicial Conference of the United States's *Long Range Plan for the Federal Courts* in 1995 acknowledged that a "conventional bench or jury trial is very expensive and not the best resolution for every kind of dispute initiated in the district courts. Often, a fair settlement by the parties . . . is the preferable resolution . . ."¹⁸⁹

¹⁷⁹ See Civil Justice Reform Act of 1990 § 102, 28 U.S.C. § 471 note (1994) (Congressional Statement of Findings).

¹⁸⁰ See Brazil, *supra* note 11, at 74.

¹⁸¹ *Id.* at 73-74.

¹⁸² See *id.* at 74.

¹⁸³ See *id.*

¹⁸⁴ See *id.* at 73.

¹⁸⁵ See *id.* at 74.

¹⁸⁶ See *id.* at 73.

¹⁸⁷ See generally Frank E. A. Sander, Varieties of Dispute Processing, Address Delivered at the National Conference on the Causes of Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), in 70 F.R.D. 111 (1976); Stipanowich, *supra* note 146, at 308-11 (summarizing Frank E. A. Sander's "multi-door courthouse" approach).

¹⁸⁸ See Adams, *supra* note 92, at 429 (citing 1990 ADMIN. OFF. CTS. ANN. REP. tbl. C-5).

¹⁸⁹ See JUDICIAL CONFERENCE OF THE U.S., *supra* note 5, at 70.

Accordingly, in light of American litigants' demonstrated willingness to settle disputes and the shared goals of mediation and court settlement, the institution of voluntary mediation programs is conceptually consistent with American values. Although the federal courts and their litigants may have no philosophical bias against mediation as a settlement facilitation method, mediation procedures must be established and implemented to instill confidence in those who use them. If they are not, the federal courts will never experience increased interest by litigants and their counsel in the process.

B. Implementing China's Court-Performed Mediation Model

A comparison of the mediation process in China to various federal court mediation programs reveals one very notable general difference that could influence public perception of and confidence in mediation in these two countries. In China, the court takes primary responsibility for directing and performing mediation.¹⁹⁰ The federal district courts, on the other hand, involve themselves much more tangentially in the process.¹⁹¹ If federal courts were to adopt a more court-performed approach to mediation programs, it is possible that more American litigants increasingly would perceive the process as valid and worthwhile.

The very term "court-annexed" mediation, commonly used to refer to federal court mediation programs, aptly captures the manner in which most United States federal district courts' mediation programs are offered to litigants. They are procedures associated with, but somehow independent from, the customary and legitimate duties of the court. When a matter is identified by a federal judge or court administrator as potentially benefiting from mediation, the case generally is referred to a lawyer for mediation who serves on a part-time or ad hoc basis and who may or may not have the skill, training, or experience to properly mediate, as the requirements for mediators are not very extensive.¹⁹² In addition, while the mediators are technically agents of the court when they perform their duties as mediators, they are not court personnel. Litigants generally also pay an additional fee for participation in federal mediation programs.¹⁹³

In light of these factors, the perceived quality of mediation stands in sharp contrast to federal court litigation, which is very highly regarded. Federal judges are not only official court personnel, but are highly trained

¹⁹⁰ See *supra* Part II.B.

¹⁹¹ See *supra* Part III.

¹⁹² See PLAPINGER & STIENSTRA, *supra* note 8, at 9, 66.

¹⁹³ See *id.* at 66.

and accomplished in the law. Moreover, American judges possess an aura of power and prestige in our society, especially Article III federal judges.¹⁹⁴ For many attorneys, the judiciary's status significantly contributes to the ability to settle cases in judicial conferences.¹⁹⁵ To the American litigant and his lawyers, there is a vast difference between the perceived quality and authority of judicial personnel adjudicating matters and those mediating them. The natural consequence of the minimal court investment in mediation is that litigants will view mediation as a "second class" remedy and bypass participation, despite its potential advantages. Whether intentional, as a result of inadequate funding, or a product of poor design, the court-annexed quality of federal mediation programs have the effect of marginalizing mediation as a secondary and less-preferred method of dispute resolution.

In comparison, mediation in China is offered and, more importantly, is perceived, by litigants on comparable terms as litigation. Mediation in China is clearly the sole responsibility of the court and an integral part of its customary civil procedure for handling disputes.¹⁹⁶ Judges or a collegiate panel of judges perform both mediation and litigation, depending upon the parties' preference.¹⁹⁷ There are no discrepancies in training or education between judges and mediators because the officials who preside over disputes perform both functions. There are also no additional costs associated with mediation. In short, mediation is not offered by the Chinese courts or perceived by its litigants as an inferior method of resolving disputes. Thus, although China's legal system generally has recognized deficiencies in need of reform, Chinese litigants have no reason to have less confidence in mediation than they would in the litigation process.

Establishing institutional mediation programs in the federal district courts as a *court-performed* process that is a customary and legitimate responsibility of the court, rather than a *court-annexed* process that is novel or experimental or simply required by federal law, is an important factor in increasing the credibility of federal court mediation. Because of the respect that American litigants have for judges and the value they place on having a fair and neutral forum in which to obtain justice, mediation must be structured more integrally with the court process to earn the trust and

¹⁹⁴ See INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CIVIL PROCEDURE 21-27 (Mauro Cappelletti ed., 1987); see also U.S. CONST. art. III, § 1 (providing that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

¹⁹⁵ See Adams, *supra* note 92, at 447 (quoting WAYNE D. BRAZIL, SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES 2 (1985)).

¹⁹⁶ See Civil Procedure Law art. 86.

¹⁹⁷ See *id.*

confidence of litigants. For example, litigants likely will have greater confidence in the mediation process, and consequently voluntarily participate more frequently, if the federal courts assign mediation duties to full-time, highly trained court personnel rather than privately practicing attorneys employed by the court. Mediation also should be made available to litigants in the federal district courts at no added expense to reinforce the perception that accessibility to meditation is a traditional and expected part of the dispute resolution process. Fee-based mediation programs imply that the process is inferior and therefore does not warrant funding like traditional litigation.¹⁹⁸ Offering mediation on a more comparable basis with litigation would enhance public confidence in the mediation process by sending a message to society that mediation can be an appropriate, effective, and fair way to resolve disputes. This enhanced credibility likely will engender increased good faith participation in mandatory mediation programs and influence potential litigants to contemplate more seriously the voluntary use of mediation both before and after filing a formal legal action.

C. Departure from China

While adopting China's court-performed mediation methods would be beneficial to the federal courts to assist parties in resolving disputes, one particular aspect of China's process which would not translate well to the federal district courts is using the judge who is assigned to adjudicate the dispute to perform the mediation. Given the role of federal district court judges and the nature of mediation generally, the judge assigned to adjudicate a particular dispute is not the appropriate individual to perform mediation of that same dispute. Although China's court-performed model of mediation bears a remarkable resemblance to the judicial settlement conference, it often differs significantly from the facilitative mediation that is utilized in most federal district court mediation programs.¹⁹⁹ The potential benefits of mediation more likely would be realized by using mediators who ultimately will not adjudicate the dispute.

Requiring the judge to conduct the mediation would infringe upon one of the most fundamental values American litigants have for the courts, namely,

¹⁹⁸ Approximately 31 of 51 federal court-annexed mediation programs operate to some degree on a fee-based system. *See* PLAPINGER & STIENSTRA, *supra* note 8, at 36–48. Typically, the parties share in the cost of mediation equally and pay the mediator the market rate. *See id.* at 66. Several districts require payment of a specific hourly rate of \$150 per hour (some examples are the Federal District Courts for the Northern District of California, the Southern District of Alabama, and the Southern District of Florida). *See id.* at 36–48.

¹⁹⁹ *See* PLAPINGER & STIENSTRA, *supra* note 8, at 65.

judicial neutrality. Judges generally are uncomfortable with discussing the relative merits of a case in a manner that may be perceived as revealing bias or favoritism for one party or another.²⁰⁰ Moreover, mediation often requires a party to reveal its true interests in a dispute to the mediator in private caucus or to be candid with the mediator concerning the merits of its legal or factual arguments.²⁰¹ Human nature being what it is, many parties are wary of conceding issues or admitting to a weakness in the presence of a person who, if settlement cannot be reached, has the authority to decide the matter.²⁰² The reasonable fear is that a judge’s decision will be influenced significantly if she knows the parties’ true interests and attitudes towards their cases’ merits and that the decision would be based on, or significantly influenced by, these elements rather than admissible facts and applicable law.²⁰³

What can be done, however, to honor the high value that Americans place on judicial neutrality and to narrow the wide chasm between the perceived quality of adjudication and the perceived quality of mediation in the federal courts is to offer mediation with full-time, trained mediators or with magistrate judges trained in mediation.²⁰⁴ Full-time mediators working closely with judges to identify appropriate cases for mediation will have the imprimatur of the court and the concomitant prestige that goes with it.²⁰⁵ However, the confidentiality of the mediation would be maintained, allowing the parties to engage without hesitancy in more open discussions in accordance with interest-based mediation principles.

In addition, mediation is a specialized process that, unlike the ad hoc discussions typical of the judicial settlement conference, warrants a uniquely

²⁰⁰ See Bundy, *supra* note 92, at 61–62; see also WAYNE D. BRAZIL, EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES 449–538 (1988) (discussing the judicial role in the settlement conference).

²⁰¹ See ROY J. LEWICKI ET AL., ESSENTIALS OF NEGOTIATION 206 (1997).

²⁰² See Adams, *supra* note 92, at 448–49.

²⁰³ See *id.* (explaining that parties will be less candid with an individual mediating a dispute about the nature and extent of their true interests if the individual mediating the claim will have the authority to decide the dispute because they will fear disclosures made during the mediation will be used against them if no agreement is reached).

²⁰⁴ The use of magistrate judges as mediators has been reported to be highly successful in the Western District of Tennessee, where the number of settlement conferences in which magistrates served as neutrals rose from 51 to 190 between 1991 and 1995, and where some magistrate judges reported partial or total settlement rates as high as 75%. See Breen, *supra* note 145, at 1008. Additionally, a judge also may be used to mediate as long as they are not the judge assigned to adjudicate the dispute. As a practical matter, however, a judge’s time might be “spent more efficiently” managing and adjudicating his own caseload. *Id.*

²⁰⁵ See Brazil, *supra* note 11, at 75.

tailored process to be faithfully implemented.²⁰⁶ Mediation usually proceeds from a specific theoretical model of dispute resolution and requires special training, skills, and procedures.²⁰⁷ It also can take considerable time, with mediation extending over several sessions. By contrast, settlement discussions conducted by judges are, to a large degree, still an unstructured, unsystematic, ad hoc process.²⁰⁸ Judges may or may not have the time, inclination, training, or skill to facilitate the negotiation effectively.²⁰⁹ For mediation to be implemented properly, it must be recognized as a separate and distinct process from ad hoc settlement discussions.

Both Chinese court mediation and the American judicial settlement conference already have a high settlement rate, and it is unlikely that mediation programs will increase the settlement rate appreciably. Rather, the likely and welcome result of institutionalized mediation would be to resolve disputes more efficiently by employing effective dispute resolution techniques early in the dispute, saving both the courts' and litigants' time and money and offering litigants an opportunity for more flexible, less distributive results than is possible at trial.²¹⁰ The aim of a systematic mediation program, fully integrated with the federal court, is to make the process of settlement more efficient and more satisfying.

V. CONCLUSION

While the effectiveness of China's court-performed mediation model is intertwined with a cultural experience vastly different from our own, a court-performed mediation system, in which mediation is established as a customary and appropriate court function, can function not only effectively in the United States federal district courts, but also likely will stimulate greater voluntary participation in mediation by litigants. This is so because the goals of mediation are consistent with American values. The court-annexed mediation model currently used in most federal district courts is not as effective as a court-performed model because it sends a message to litigants that mediation is a novel and inferior dispute resolution process, not worthy of being a customary function of court personnel or of funding like

²⁰⁶ See generally Bush, *supra* note 11.

²⁰⁷ See Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S.C. L. REV. 305, 307–08 (1971). See generally Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEG. L. REV. 7 (1996) (identifying four general models of mediation and discussing the various strategies and techniques utilized in each).

²⁰⁸ See Rammelt, *supra* note 160, at 971.

²⁰⁹ See Adams, *supra* note 92, at 450–51.

²¹⁰ See Brazil, *supra* note 11, at 76.

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traditional litigation. Given the historical reverence that Americans have for the federal judiciary, it is not surprising that such marginalization of the mediation process results in low levels of interest by litigants. Once federal district courts assume greater responsibility for direction of the federal mediation programs and implement them as a fully integrated part of the courts' regular and customary functions, litigants will gain a greater respect for mediation and seek out its potential benefits more readily.

